Google Inc. et al v. Egger et al

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LEGISLATIVE HISTORY
P.L. 95-511

FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

P.L. 95-511, see page 92 Stat. 1783

Senate Report (Judiciary Committee) No. 95-604 (I and II), Nov. 15, 22, 1977 [To accompany S. 1566]

Senate Report (Intelligence Committee) No. 95-701, Mar. 14, 1978 [To accompany S. 1566]

House Report [Intelligence Committee) No. 95-1283, June 8, 1978 [To accompany H.R. 7308]

House Conference Report No. 95-1720, Oct. 5, 1978 [To accompany S. 1566]

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

Senate April 20, October 9, 1978

House September 7, October 12, 1978

The Senate bill was passed in lieu of the House bill. The Senate Reports (this page, p. 3970, p. 3973) and the House Conference Report (p. 4048) are set out.

SENATE REPORT NO. 95-604—PART 1

[page 1]

The Committee on the Judiciary, to which was referred the bill (S. 1566) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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PURPOSE OF AMENDMENTS

The amendments to S. 1566 are designed to clarify and make more explicit the statutory intent, as well as to provide further safeguards for individuals subjected to electronic surveillance pursuant to this new chapter. Certain amendments are also designed to provide a detailed procedure for challenging such surveillance, and any evidence derived therefrom, during the course of a formal proceeding.

Finally, the reported bill adds an amendment to Chapter 119 of title 18, United States Code (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90-351, section 802). This latter amendment is technical and conforming in nature and is designed to integrate certain provisions of Chapters 119 and 120. A more detailed explanation of the individual amendments is contained in the section-by-section analysis of this report.

or lawful resident alien is the target of an electronic surveillance, the judge is required to review the Executive Branch certification to determine if it is clearly erroneous. No review of the certification was allowed in S. 3197. Finally, S. 1566 spells out that the Executive cannot engage in electronic surveillance within the United States without a prior judicial warrant. This is accomplished by repealing the so-called executive "inherent power" disclaimer clause currently found in section 2511(3) of Title 18, United States Code. S. 1566 provides instead that its statutory procedures (and those found in chapter 119 of title 18) "shall be the exclusive means" for conducting electronic surveillance, as defined in the legislation, in the United States. The highly controversial disclaimer has often been cited as evidence of a congressional ratification of the President's inherent constitutional power to engage in electronic surveillance in order to obtain foreign intelligence information essential to the national security. Despite the admonition of the Supreme Court that the language of the disclaimer was "neutral" and did not reflect any such congressional recognition of inherent power, the section has been a major source of controversy. By repeal-

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ing section 2511(3) and expressly stating that the statutory warrant procedures spelled out in the law must be followed in conducting electronic surveillance in the United States, this legislation ends the eight-year debate over the meaning and scope of the inherent power disclaimer clause.

II. STATEMENT OF NEED

The Federal Government has never enacted legislation to regulate the use of electronic surveillance within the United States for foreign intelligence purposes. Although efforts have been made in recent years by Senator Kennedy, Senator Nelson, Senator Mathias, and former Senator Philip A. Hart to circumscribe the power of the executive branch to engage in such surveillance, and the Senate came very close to enacting such legislation during the 94th Congress, the fact remains that such efforts have never been successful.[2] The hearings held this year on S. 1566 were the sixth set of hearings on warrantless wiretapping in as many years.[3] The Committee believes that S. 1566 is a measure which can successfully break this impasse and provide effective, reasonable safeguards to ensure accountability and prevent improper surveillance. S. 1566 goes a long way in striking a fair and just balance between protection of national security and protection of personal liberties. It is a recognition by both the Executive Branch and the Congress that the statutory rule of law must prevail in the area of foreign intelligence surveillance.

The need for such statutory safeguards has become apparent in recent years. This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused. These abuses were initially illuminated in 1973 during the investigation of the Watergate break-in. Since that time, however, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, chaired by Senator Church (hereafter referred to as the Church Committee), has concluded that every President since Franklin D. Roosevelt asserted the authority to authorize warrantless electronic surveillance and exercised that authority. While the number of illegal or improper national security taps and bugs conducted during the Nixon administration may have exceeded those in previous administrations, the surveillances were regrettably by no means atypical. In summarizing its

[2] See, e.g., S. 3197, *Foreign Intelligence Surveillance Act of 1976*, 94th Cong., 2d sess. (1976); S. 743, *National Security Surveillance Act of 1975*, 94th Cong., 1st sess. (1975); S. 2820, *Surveillance Practices and Procedures Act of 1973*, 93rd Cong., 1st sess. (1973); S. 4062, *Freedom from Surveillance Act of 1974*, 93rd Cong., 2d sess. (1974).

[3] See, e.g., Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, *Foreign Intelligence Surveillance Act of 1976*, 94th Cong., 2d sess. (1976): Senate Select Committee on Intelligence, *Foreign Intelligence Surveillance Act of 1976*, 94th Cong., 2d sess. (1976); Subcommittee on Surveillance of the Senate Committee on Foreign Relations and the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, *Warrantless Wiretaping and Electronic Surveillance*, 94th Cong., 1st sess. (1975); Joint Hearings before the Subcommittee on Administrative Practice and Procedure and the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, *Warrantless Wiretapping and Electronic Surveillance*, 93d Cong., 2d sess. (1974); Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, *Warrantless Wiretapping*, 92d Cong., 2d sess. (1972). In the joint report of the Subcommittees on Surveillance and Administrative Practice and Procedure issued in 1975, findings were made that "there are not adequate written standards or criteria within the executive branch to govern the warrantless electronic surveillance of either Americans or foreigners. There is a gap in the statutes, the case, and in administrative regulation on the use of warrantless wiretaps or bugs by executive branch agencies for alleged 'national security' purposes."

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conclusion that surveillance was "often conducted by illegal or improper means," the Church committee wrote:

> Since the 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant. . . . [P]ast subjects of these surveillances have included a United States Congressman, Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group. (vol. 2, p. 12)
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> The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment Rights of both the targets and those with whom the targets communicated. The inherently intrusive nature of electronic surveillance, moreover, has enabled the Government to generate vast amounts of information—unrelated to any legitimate government interest—about the personal and political lives of American citizens. The collection of this type of information has, in turn, raised the danger of its use for partisan political and other improper ends by senior administration officials. (vol. 3, p. 32.)

Also formidable—although incalculable—is the "chilling effect" which warrantless electronic surveillance may have on the constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights is concerned not only with direct infringements on constitutional rights, but also with government activities which effectively inhibit the exercise of these rights. The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

S. 1566 is designed, therefore, to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it. At the same time, however, this legislation does not prohibit the legitimate use of electronic surveillance to obtain foreign intelligence information. As the Church committee pointed out:

> Electronic surveillance techniques have understandably enabled these agencies to obtain valuable information relevant to their legitimate intelligence missions. Use of these techniques has provided the Government with vital intelligence, which would be difficult to acquire through other means, about the activities and intentions of foreign powers and has
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> provided important leads in counterespionage cases. (vol. 2, p. 274)

Safeguarding national security against the intelligence activities of foreign agents remains a vitally important Government purpose. Few would dispute the fact that we live in a dangerous world in which hostile intelligence activities in this country are still carried on to our detriment.

Striking a sound balance between the need for such surveillance and the protection of civil liberties lies at the heart of S. 1566. As Senator Kennedy stated in introducing S. 1566:

> The complexity of the problem must not be underestimated. Electronic surveillance can be a useful tool for the Government's gathering of certain kinds of information; yet, if abused, it can also constitute a particularly indiscriminate and penetrating invasion of the privacy of our citizens. My objective over the past six years has been to reach some kind of fair balance that will protect the security of the United States without infringing on our citizens' human liberties and rights.[4]

The committee believes that the Executive Branch of Government should have, under proper circumstances and with appropriate safeguards, authority to acquire important foreign intelligence information by means of electronic surveillance. The committee also believes that the past record and the state of the law in the area make it desirable that the Executive Branch not be the sole or final arbiter of when such proper circumstances exist. S. 1566 is designed to permit the Government to gather necessary foreign intelligence information by means of electronic surveillance but under limitations and according to procedural guidelines which will better safeguard the rights of individuals.

III. BACKGROUND

The bipartisan congressional support for S. 1566 and the constructive cooperation of the Executive Branch toward the legislation signifies a constructive change in the ongoing debate over electronic sur-

One situation in which such a motion might be presented would be that in which the court orders disclosed to the party the court order and accompanying application under subsection (e) prior to ruling on the legality of the surveillance. Such motion would also be appropriate, however, even after the court's finding of legality if, in subsequent trial testimony, a Government witness provides evidence that the electronic surveillance may have been authorized or conducted in violation of the court order. The most common circumstance in which such a motion might be appropriate would be a situation in which a defendant queries the government under 18 U.S.C. 3504 and discovers that he has been intercepted by electronic surveillance even before the government has decided whether evidence derived from that surveillance will be used in the presentation of its case. In this instance, under the appropriate factual circumstances, the defendant might move to suppress such evidence under this subsection even without having seen any of the underlying documentation.

[55] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
[56] 18 U.S.C. 3500 et seq.
[57] *United States v. Andolschek*, 142 F. 2d 503 (2nd Cir. 1944).
[58] See also. *Alderman v. United States*, 394 U.S. 165 (1967).

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A motion under this subsection shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the movant was not aware of the grounds for the motion. the only change in subsection (d) from S. 3197 is to remove as a separate, independent basis for suppression the fact that the order was insufficient on its face. This is not a substantive change, however, since communications acquired pursuant to an order insufficient on its face would be unlawfully acquired and therefore subject to suppression under paragraph (1).

Subsection (e) states in detail the procedure the court shall follow when it receives a notification under subsection (c) or a suppression motion is filed under subsection (d). This procedure applies, for example, whenever an individual makes a motion pursuant to subsection (d) or 18 U.S.C. 3504, or any other statute or rule of the United States to discover, obtain or suppress evidence or information obtained or derived from electronic surveillance conducted pursuant to this chapter (for example, Rule 12 of the Federal Rules of Criminal Procedure). Although a number of different procedures might be used to attack the legality of the surveillance, it is this procedure "notwithstanding any other law" that must be used to resolve the question. The Committee wishes to make very clear that the procedures set out in subsection (e) apply whatever the underlying rule or statute referred to in the motion. This is necessary to prevent the carefully drawn procedures in subsection (e) from being bypassed by the inventive litigant using a new statute, rule or judicial construction.

The special procedures in subsection (e) cannot be invoked until they are triggered by a Government affidavit that disclosure or an adversary hearing would harm the national security of the United States. If no such assertion is made, the Committee envisions that mandatory disclosure of the application and order, and discretionary disclosure of other surveillance materials, would be made to the defendant, as is required under Title III.[59] When the procedure is so triggered, however, the Government must make available to the court a copy of the court order and accompanying application upon which the surveillance was based.

The court must then conduct an *ex parte*, *in camera* inspection of these materials as well as any other documents which the Government may be ordered to provide, to determine whether the surveillance was authorized and conducted in a manner which did not violate any constitutional or statutory right of the person against whom the evidence is sought to be introduced. The subsection further provides that in making such a determination, the court may order disclosed to the person against whom the evidence is to be introduced the court order or accompanying application, or portions thereof, or other materials relating to the surveillance, only if it finds that such disclosure is necessary to make an accurate determination of the legality of the surveillance. Thus, this subsection deals with the procedure to be followed by the trial court in determining the legality (or illegality) of the surveillance.

The question of how to determine the legality of an electronic surveilance conducted for foreign intelligence purposes has never been

[59] 18 U.S.C. 2518 (9) and (10).

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decided by the Supreme Court. As Justice Stewart noted in his concurring opinion in *Giordano* v. *United States*, "Moreover, we did not in *Alderman*, *Butenko* or *Ivanov*, and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination [of legality.]" 394 U.S. 310, 314 (1968); see also, *Taglianetti* v. *United States*, 394 U.S. 316 (1968).[60] The committee views the procedures set forth in this subsection as striking a reasonable balance between an entirely *in camera* proceeding which might adversely affect the defendant's ability to defend himself, and mandatory disclosure, which might occasionally result in the wholesale revelation of sensitive foreign intelligence information.

The decision whether it is necessary to order disclosure to a person is for the court to make after reviewing the underlying documentation and determining its volume, scope and complexity. The committee has noted the reasoned discussion of these matters in the opinion of the Court in *United States* v. *Butenko*, *supra*. There, the court, faced with the difficult problem of determining what standard to follow in balancing national security interests with the right to a fair trial stated:

> The distinguished district court judge reviewed *in camera* the records of the wiretaps at issue here before holding the surveillances to be legal . . . Since the question confronting the district court as to the second set of interceptions was the legality of the taps, not the existence of tainted evidence, it was within his discretion to grant or to deny Ivanov's request for disclosure and a hearing. The exercise of this discretion is to be guided by an evaluation of the complexity of the factors to be considered by the court and by the likelihood that adversary presentation would substantially promote a more accurate decision. (494 F. 2d at 607)

Thus, in some cases, the court will likely be able to determine the legality of the surveillance without any disclosure to the defendant.

In other cases, however, the question may be more complex because of, for example, indications of possible misrepresentation of fact, vague identification of the persons to be surveilled or surveillance records which includes a significant amount of nonforeign intelligence information, calling into question compliance with the minimization standards contained in the order. In such cases, the committee contemplates that the court will likely decide to order disclosure to the defendant, in whole or in part since such disclosure "is necessary to make an accurate determination of the legality of the surveillance."[60]

Cases may arise, of course, where the court believes that disclosure is necessary to make an accurate determination of legality, but the Government argues that to do so, even given the court's broad discretionary power to excise certain sensitive portions, would damage the national security. In such situations the Government must choose—either disclose the material or forego the use of the surveillance-based evidence. Indeed, if the Government objects to the disclosure, thus preventing a proper adjudication of legality, the prosecution would

[60] Cf. *Alderman v. United States,* 394 U.S. 165, 182 n. 14 (1968); *Taglianetti v. United States, supra* at 317.

8. 89 S.Ct. 1099, 22 L.Ed.2d 302.

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probably have to be dismissed, and, where the court determines that the surveillance was unlawfully authorized or conducted, the court would, "in accordance with the requirements of law," suppress that evidence which was unlawfully obtained.[61]

Where the court determines that the surveillance was lawfully authorized and conducted, it would, of course, deny any motion to suppress. In addition, the Committee emphasizes that, once a judicial determination is made that the surveillance was lawful, a motion for discovery of evidence must be denied unless disclosure or discovery is required by the requirements of due process.

Subsection (f) provides for notice to be served on United States citizens and permanent resident aliens who were targets of an emergency surveillance and, in the judge's discretion, on other citizens and resident aliens who are incidentally overheard, where a judge denies an application for an order approving an emergency electronic surveillance. Such notice shall be limited to the fact that an application was made, the period of the emergency surveillance, and the fact that during the period information was or was not obtained. This notice may be postponed for a period of up to ninety days upon a showing of good cause to the judge. Thereafter the judge may forego the requirement of notice upon a second showing of good cause.

The fact which triggers the notice requirement—the failure to obtain approval of an emergency surveillance—need not be based on a determination by the court that the target is not an agent of a foreign power engaged in clandestine intelligence activities, sabotage, or terrorist activities or a person aiding such agent. Failure to secure a warrant could be based on a number of other factors, such as an improper certification. A requirement of notice in all cases would have the potential of compromising the fact that the Government had focused an investigation on the target. Even where the target is not, in fact, an agent of a foreign power, giving notice to the person may result in compromising an on-going foreign intelligence investigation because